

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

D'ARRIGO BROS. CO. OF NEW YORK, INC.,

Plaintiff,

Case No.: _____

-against-

J & S PRODUCE CO., INC.

Defendant.

**AFFIDAVIT IN SUPPORT OF APPLICATION FOR
PRELIMINARY INJUNCTION**

STATE OF NEW YORK)
) ss.
COUNTY OF BRONX)

PAUL D'ARRIGO, being duly sworn, deposes and says:

1. I am the President of D'ARRIGO BROS. CO. OF NEW YORK ("D'ARRIGO"), plaintiff herein, and I make this affidavit in support of an application for a Preliminary Injunction pursuant to F.R. Civ. P. Rule 65.
2. Plaintiff is a seller of wholesale quantities of perishable agricultural commodities located at 316 New York City Terminal Market, Bronx, New York 10474.
3. J & S PRODUCE CO. INC. (J & S) is the purchaser of wholesale quantities of perishable agricultural commodities and is licensed as a dealer and/or commission merchant under The Perishable Agricultural Commodities ACT of 1930, as amended, 7 U.S.C. 499a, etc. ("PACA").

4. From April 28, 2005 through October 12, 2006, the plaintiff sold to J & S wholesale lots of perishable agricultural commodities in interstate commerce, the balance of which TWO HUNDRED THOUSAND SIXTY-THREE SIXTEEN and 83/100 (\$263,016.83) DOLLARS, for which the plaintiff has not been paid as of the date of this affidavit.

5 The defendant J & S has not made any payment of this balance to the plaintiffs for the perishable agricultural commodities.

6 The defendant J & S is obligated to hold all perishables and the proceeds from the sale of such perishables, in trust, for payment to the plaintiffs.

7 The plaintiffs furnished timely billings, annexed hereto and made part hereof, as Exhibit "A," to J & S which contained the following language:

The perishable agricultural commodities listed on this invoice are sold subject to the statutory trust authorized by Section 5(c) of the Perishable Agricultural Commodities Act 1930(7 U.S.C. 499(e)(c)). The seller of these commodities retains a trust claim over these commodities, all inventories of food or other products derived from these commodities and any receivables or proceeds from the sale of these commodities until full payment is received. In the event of the enforcement of our trust claim we will seek to recover reasonable attorney's fees and the costs of recovery. .

8 A copy of the complaint is annexed herein, as Exhibit "B."

9. We respectfully submit that a Preliminary Injunction should be issued enjoining the defendant from the dissipation of its inventory and accounts receivable to creditors other than those such as the plaintiffs who has preserved their trust benefits under PACA. The plaintiffs request this Court to direct the defendant, J & S, to set aside the fund of TWO HUNDRED THOUSAND SIXTY-THREE SIXTEEN and 83/100 (\$263,016.83) DOLLARS, as well as the

collection of all accounts receivable pending an Evidentiary Hearing or such further order of the Court in order that the remainder of plaintiffs' trust claims be preserved and not be dissipated in violation of law.

10. The defendant J & S sold the produce which it accepted from the plaintiff in the ordinary course of business. Produce has a short shelf-life, hence, the use by the defendant of the produce which it purchased from the plaintiff. The ten (10) day requirement of the statute has been violated. This defendant continues to breach its duties as a trustee under PACA. That is why we request the relief concerning immediate delivery of this Order upon the defendant or any other entity with which it is involved as a depositor or otherwise, be granted or this defendant will dissipate and prevent the plaintiff from protecting its trust interest in the business conducted by this defendant.


11. The defendant had issued ten (10) checks to plaintiff aggregating the sum of \$43,025.33, all of which have been returned for insufficient funds. Copies of these checks are annexed hereto and made part hereof as Exhibit "C".

12. No previous application has been made for the relief requested herein.

WHEREFORE, it is respectfully requested that the Preliminary Injunction be granted and the trust fund be set aside pursuant to order of this Court.


PAUL D'ARRIGO

Sworn to before this
14th day of May, 2007


Notary Public

JO ANN TAYLOR
NOTARY PUBLIC, State of New Jersey
#2313819
Commission Expires April 20, 2009

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